In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1514

MARION R. HESSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that payments received by her under an agreement incident to a divorce were not includible in her gross income under Section 71(a) of the Internal Revenue Code of 1954.

The pertinent facts are as follows: In 1966, petitioner and her then husband Stanley Hesse each instituted an action for divorce. In October 1967, petitioner and her husband entered into an agreement setting forth their respective marital and property rights. Under the agreement, petitioner was to receive $500,000, with the first payment to be made ten days after entry of the final divorce decree and the remainder to be paid in ten annual installments. In accordance with the agreement, Stanley Hesse paid petitioner $50,000 in 1967 and $45,000 in each of the years 1968 and 1969 (Pet. App. C 40-50).

On audit, the Commissioner of Internal Revenue determined that the amounts paid to petitioner under the agreement were includible in her gross income under Section 71(a) of the Internal Revenue Code of 1954.[1] The Tax Court found that the payments in question were "periodic payments" in discharge of a legal obligation within the meaning of Section 71(a) and were not made in satisfaction of petitioner's property rights. It accordingly upheld the Commissioner's determination (Pet. App. C 35-63) and the court of appeals affirmed in a brief order (Pet. App. A 23-24).[2]

1. Petitioner principally argues (Pet. 10-20) that the Tax Court erred in denying her a new trial for the purpose of showing that the payments were not "periodic" and therefore not includible in gross income. In her petition to the Tax Court (R. 6a-9a)[3] and at trial, petitioner contested the Commissioner's determination solely on the ground that her ex-husband made the payments in question in satisfaction of her property rights. In making this claim, petitioner never relied upon Section 71(c),

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[1]For protective purposes, the Commissioner disallowed the deductions claimed by Stanley Hesse for the payments. Under Section 215 of the Code, payments incident to a divorce or separation decree are deductible by the payor-spouse to the extent they are includible in the recipient spouse's income under Section 71.

[2]At the same time, the Tax Court entered a decision in favor of Stanley Hesse. The Commissioner appealed that decision to the Fifth Circuit in order to protect the revenue in the event the Tax Court's decision in this case was reversed. Further proceedings in that appeal have been deferred until the decision is final in this case.

[3]"R." refers to the record appendix in the court of appeals.

which provides that installment payments in discharge of a principal sum are not "periodic payments" includible in the recipient's gross income, unless they are payable over a period longer than ten years. Indeed, at trial, petitioner's counsel specifically conceded (R. 111a-112a) that the payments in issue were periodic payments within the meaning of Section 71(a) because the agreement provided that they were payable over a period of more than ten years.

After the Tax Court had rendered its decision, petitioner obtained new counsel and filed a motion for further trial for the purpose of establishing that the payments were not periodic. She alleged that her prior counsel had erroneously conceded this point, as a result of misunderstanding the provisions of the settlement agreement dealing with the timing of the eleven required installment payments (R. 39a-49a). The Tax Court denied the motion for further trial, finding that petitioner had been represented by competent counsel, that no "gross error" in the conduct of the trial had been shown, and that the initiation of further evidentiary proceedings in the case would impose an unwarranted additional burden on both Stanley Hesse and the Commissioner (Pet. App. B 31-34).

There is no basis for further review of the Tax Court's denial of petitioner's motion for a further trial. The Tax Court has broad discretion in deciding whether to grant a rehearing, and its rulings in this regard are not normally subject to review except upon a clear showing of abuse of discretion. *Nor-Cal Adjusters* v. *Commissioner*, 503 F. 2d 359 (C.A. 9); *Chiquita Mining Co.* v. *Commissioner*, 148 F.2d 306, 310 (C.A. 9); *Francis Edward McGillick Foundation* v. *Commissioner*, 278 F.2d 643, 649 (C.A. 3).

The record here shows that the Tax Court acted within its discretion in denying petitioner's motion. Petitioner never contended that her trial counsel was incompetent or unauthorized to represent her. Indeed, she admitted in the Tax Court that he was "able and competent" in the conduct of the issue presented to the court (R. 44a). The concession by petitioner's trial counsel that the payments in question were periodic was not unreasonable in view of the ambiguous language of the settlement agreement (R. 158a-159a). At worst, the concession represented an error of judgment by petitioner's trial counsel and, as such, presented no compelling reason for the Tax Court to conduct an additional evidentiary proceeding.

Contrary to petitioner's assertion (Pet. 11, 13), the decision below does not conflict with *Harris* v. *Commissioner*, 340 U.S. 106. As petitioner concedes (Pet. 11), *Harris* was a gift tax case and did not involve the propriety of the Tax Court's refusal to reopen a decided case to consider a new theory the taxpayer wanted to assert. Moreover, there is no conflict with the decisions of the Seventh and Eighth Circuits (Pet. 14-16) dealing with the computation of the ten-year period under Section 71(c). Since petitioner conceded the Section 71(c) point, neither the Tax Court nor the court of appeals had any occasion to make any determination with respect to that issue.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.